BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
BENJAMIN CLAYTON)

Appearances:

For Appellant: Charles M. Walker, Attorney at Law

For Respondent: Jack L. Rubin, Assistant Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Benjamin Clayton to a proposed assessment of additional personal income tax in the amount of $30,635.22 for the year 1949. Appellant has paid the tax assessed and this appeal, accordingly, is to be treated as an appeal from the denial of a claim for refund, as provided for in Section 19061.1 of the Revenue and Taxation Code.

Appellant is the surviving husband of Julia Scott Clayton, who died on June 9, 1949, leaving an estate consisting of an undivided one-half interest in what had been community property owned by herself and Appellant. The assets of the estate were in the form of securities, receivables and land. Mrs. Clayton's will left her interest in the property to the Clayton Foundation for Research (hereinafter referred to as the Foundation) subject to the payment of a bequest of $1,000,000 to her son.

Thereafter, within the year 1949, Appellant and the Foundation entered into a series of agreements to divide the property equally between them on the basis of its fair market value at the date of the death of Mrs. Clayton. Some items of property went entirely to Appellant and others went entirely to the Foundation; some of the homogeneous items, such as a block of shares in one corporation, were divided evenly between the parties and others were divided between them in unequal fractions. Each party received assets of the aggregate fair market value of $7,382,837.31. The division was subsequently approved by the probate court in its decree of final distribution.

The Franchise Tax Board made the assessment involved on the theory that, except where there was equal division of homogeneous assets, there was a sale or other disposition of property which resulted in taxable gain to the Appellant in the amount of the difference between the cost of the one-half interest in the property owned by him as the surviving spouse and the fair market value of the property which he received from the Foundation in return for relinquishing his interest.

For the year in question, the following sections of the Revenue and Taxation Code provided:

> 9'17651. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in Article 5 of this chapter for determining gain, and the loss shall be the excess of the adjusted basis provided in that article for determining loss over the amount realized."
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> 917652. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of any property other than money received."

Section 17741 provided, so far as here material! that the basis of property is its cost (cf. present Section 18045(e)).

The sections quoted above were substantially identical to Section 111 of the United States Internal Revenue Code of 1939. The Franchise Tax Board, however, has not called to our attention, nor has our research disclosed, any decision applying either the State or Federal statute to an equal division of property among owners in common, To the contrary, the decisions indicate that a division of property in the nature of a partition between common owners may be consummated without tax consequences. Thus, the United States Board of Tax Appeals and its successor, the Tax Court, have held that equal divisions of community property by divorcing spouses were not within the purview of Section 111 (Frances R. Walz, Adm., 32 B.T.A. 718; Ann Y. Oliver, T.C. Memo,, Dkt.Nos. 6122, 6123, 12144, entered April 29, 1949; Osceola Heard Davenport, T.C. Memo, Dkt. No, 38331, entered July 30, 1953).

In the Walz case the Board of Tax Appeals stated:

> "Can it be said that when two or more parties are the owners in common of a

> mixed aggregate of assets purchased for profit and decide to partition it, a gain or loss results from such partition? We think not. If, when the property owned in common is distributed in kind to the respective parties in accordance with their partition agreement, one of the parties is allowed a deductible loss because certain of the property has declined in value from the cost of its original purchase, it would mean by the same line of reasoning that, if the property had appreciated in value from the time of its original purchase, there would be a taxable gain in the partition transaction. We know of no Board or court case which would be authority for such a proposition and we have been cited to none. *** Here there has been no sale or exchange of the property in question, but a division of property,"

In our opinion the foregoing Federal decisions compel a conclusion that the division of property between Appellant and the Foundation did not give rise to any taxable gain.

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Benjamin Clayton for refund of personal income tax in the amount of $30,635.22 for the year 1949 be and the same is hereby reversed.

Done at Sacramento, California, this 17th day of February, 1959, by the State Board of Equalization.

Paul R. Leake, Chairman

George R. Reilly, Member

John W. Lynch, Member

_____, Member

_____, Member

ATTEST: Dixwell L, Pierce, Secretary